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Court of Appeal, First Appellate District
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CASE NO. A161787

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

RAPTORS ARE THE SOLUTION,

Petitioner,

v.

CALIFORNIA DEPARTMENT OF PESTICIDE REGULATION,

Respondent.

APPELLANT'S REPLY BRIEF

On Appeal from the Superior Court for the State of California
County of Alameda Superior Court, Case No. RG18908605
Hon. Brad Seligman

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INTRODUCTION

The central question on this appeal is whether the Department of Pesticide Regulation ("Department") satisfied its legal obligations under the California Environmental Quality Act, Public Resources Code section 2100 et seq. ("CEQA"), when it acted to renew the registration of diphacinone without reevaluation. Those obligations flow directly from the Department's own CEQA-certified regulations and statutory mandates. Every year, the Department must decide whether to renew a previously registered pesticide, applying the same standards that govern its initial registration decision. For most compounds, that annual decision is routine because there is no information suggesting new concerns about a pesticide's adverse impacts.[1] But where, as here, new scientific information indicates that a compound may be causing adverse environmental effects, the Department must investigate that information as part of the renewal process, documenting its

[1] In 2017, for instance, the Department proposed to renew all 13,877 registered pesticides without reevaluating any pesticides that were not already undergoing reevaluation. *See* AR 03164-66. In response to the Department's solicitation of public comments on this proposed decision, Raptors submitted recent studies indicating adverse effects from the seven registered anticoagulant rodenticides on non-target wildlife. AR 03167-75. While that new information triggered the Department's obligation to conduct a more in-depth investigation for the seven compounds, renewal of the other 13,870 registered pesticides occurred without further analysis.

environmental analysis in an investigation report and opening a formal reevaluation of the pesticide if the agency identifies a significant adverse effect.

Raptors' legal claims challenge the adequacy of the environmental analysis contained in the Department's November 2018 Investigation Report under CEQA's substantive standards. In that Report, the Department determined that there was substantial evidence to reevaluate four so-called "second-generation" anticoagulant rodenticides subject to renewal but located insufficient evidence to place three "first-generation" anticoagulants – including diphacinone – into reevaluation. This was despite overwhelming evidence that diphacinone, individually and in combination with the other rodenticides, has been contributing to the decimation of non-target wildlife populations by, among other things, degrading the animals' immune systems and making them more susceptible to diseases like mange.

Rather than engage Raptors' arguments, the Department tries to sidestep them through several sleights of hand. First, it attempts to sever its decision to renew the seven anticoagulants from its decision not to reevaluate the first-generation compounds, characterizing the

latter as a separable and rejected project not subject to CEQA.[2] This effort fails. The Department's own regulations require it to determine whether reevaluation is warranted for a pesticide each time it considers renewal. The whole of the CEQA action thus began with the Department's issuance of a legal notice to renew the seven anticoagulants for calendar year 2018 and culminated in the Department's November 2018 decision to put only the second-generation compounds into reevaluation. This is the project—an affirmatively approved one—to which CEQA applies.

Having first argued that CEQA does not apply, the Department then tries to sweep away its obvious failures to satisfy CEQA's core legal mandates by, among other things: seeking deference under an inapplicable substantial evidence standard of review, pretending that the required cumulative impact analysis exists without any plausible record support, and offering irrelevant *post hoc* rationalizations for the omission of core evidence from the Investigation Report's analysis. Again, these efforts fail. As this Court has recognized, although a certified regulatory program allows for expedited environmental

[2] At trial, the Department filed a motion to strike Raptors' CEQA arguments. AA 178. The trial court denied that motion and reached the merits of the CEQA claim. AA 228-32, 423. Because the Department did not cross-appeal this threshold issue, Raptors did not address it in the opening brief.

review, it "is not a 'blanket exemption' from . . . CEQA's substantive requirements to thoroughly evaluate specific environmental effects." *Pesticide Action Network N. Am. v. Dept. of Pesticide Regul.* ("*PANNA*"), 16 Cal. App. 5th 224, 243 (2017) (citing *Mountain Lion Found. v. Fish & Game Comm'n*, 16 Cal. 4th 105, 114 (1997)). Rather, the Department was required to meaningfully analyze the information before it to determine whether there was substantial evidence of diphacinone's adverse effects on wildlife, individually or on top of the harms posed by other pesticides. And it was required to clearly document its conclusions about diphacinone in its Investigation Report, as well as the analytic route it took to reach those conclusions. It did not.

Ultimately, the Department does not engage Raptors' legal claims, let alone rebut them. It instead devotes pages of briefing to explaining why, in its view, the science supports its decision not to reevaluate diphacinone. While that argument is also wrong, the question before the Court is simpler: Did the Department satisfy the information disclosure requirements of CEQA? The answer is "no."

ARGUMENT

I. CEQA Applies to the Department's Decision to Renew Diphacinone's Registration Without Reevaluation

As a threshold matter, the Department recycles its argument

made – and twice rejected[3] – below that CEQA is inapplicable to the Department's decision not to put diphacinone into reevaluation because that decision amounted to a project disapproval. *See* Dept. Br. at 25 (citing CEQA Guidelines § 15270(a)).[4] The Department's argument falters on a mistaken premise – that the challenged project comprised only the Department's consideration whether to reevaluate diphacinone, which the Department pretends occurred in a regulatory vacuum. Not so. The Department's certified regulatory program makes its November 2018 decision on reevaluation an integral part of its decision to renew diphacinone for the 2018 calendar year. *See* 3 Cal. Code Regs. ("C.C.R.") § 6215(c). This is the entire project at issue, one that was indisputably *approved* by the Department and to which CEQA's "broad policy goals and substantive requirements" apply. *PANNA*, 16 Cal. App. 5th at 243.

The Department's attempt to sever its renewal and reevaluation decisions is defeated by its own CEQA-certified regulations and the procedural facts. And the Department's arguments to the contrary – its

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[3] *See* AA 228-32 (denying Department's motion to strike all CEQA references); AA 423 (explaining that the Department's certified regulatory program is subject to CEQA).

[4] References to "CEQA Guidelines" are to sections 15000 through 15387 of Title 14, Division 6, Chapter 3 of the California Code of Regulations.

reliance on inapposite authority about project rejections, its passing claim that the renewal decision was ministerial, and its halfhearted suggestion that Raptors somehow waived its argument about CEQA's applicability despite prevailing on it below – fare no better.

A. The Department's Attempt to Sever Its Reevaluation Decision from Renewal Conflicts with Its Own Regulations

The Department's attempt to characterize its decision on reevaluation of diphacinone as a standalone project ignores both the regulatory context and the facts. To determine the scope of activities subject to a certified regulatory program, the analysis must begin with the "language of [CEQA] section 21080.5 and the terms of the agency's certification." *Mountain Lion Found.*, 16 Cal. 4th at 131. To gain certification under section 21080.5 of CEQA, an agency's regulatory program must require CEQA-equivalent noticing and consultation for "proposed activit[ies]" subject to the program, as well as CEQA-equivalent environmental review. Cal. Pub. Res. Code § 21080.5(d)(2). The Department's regulations prescribe such noticing, consultation, and review requirements for all activities involving "renewal" and "reevaluation" of registered pesticides, in addition to initial pesticide "registrations."[5] 3 C.C.R. §§ 6252-55; *see also* CEQA Guidelines

[5] For these reasons, the Department's characterization of its certified

§ 15251(i) (including "registration" and "evaluation" of pesticides in scope of certification). Pursuant to its section 21080.5 certification, the Department may substitute the environmental review documents prescribed in its regulations for the usual CEQA documents to inform its decisions on these activities, but the program "remains subject to other provisions in CEQA such as the policy of avoiding significant adverse effects on the environment where feasible." CEQA Guidelines § 15250; *see PANNA*, 16 Cal. App. 5th at 241.

Among the CEQA provisions applicable to certified regulatory programs are those governing the contours of a "project." *See* CEQA Guidelines § 15250. A "project" for CEQA purposes means "*the whole of an action*, which has the potential for resulting in either a direct . . . or a reasonably foreseeable indirect physical change in the environment." CEQA Guidelines § 15378 (emphasis added). Under this definition, "when one activity is an integral part of another activity, the combined activities are within the scope of the same CEQA project." *Tuolumne Cnty. Citizens for Responsible Growth v. City of Sonora* ("*Tuolumne County*"), 155 Cal. App. 4th 1214, 1229 (2007) (rejecting the argument that two activities are not part of the same project simply because they

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regulatory program as one governing only "registration" of pesticides is inaccurate. Dept. Br. at 28-29.

"could be implemented independently of each other"). This includes circumstances where a "second activity is a reasonably foreseeable consequence of the first activity" (*Sierra Club v. W. Side Irrigation Dist.*, 128 Cal. App. 4th 690, 698 (2005)), where the activities are "part of a coordinated endeavor," (*Tuolumne County.*, 155 Cal. App. 4th at 1228), and where the activities are simply "related to each other" (*County of Ventura v. City of Moorpark*, 24 Cal. App. 5th 377, 385 (2018)). In all such circumstances, CEQA prohibits chopping the "group of interrelated actions . . . into bite-size pieces to avoid CEQA review." *Ass'n for a Cleaner Env't v. Yosemite Cmty. Coll. Dist.*, 116 Cal. App. 4th 629, 639 (2004).

Here, the Department's own regulations expressly make consideration of reevaluation an integral component of annual renewal activities and thus part of the same CEQA "project." The Department has a legislative mandate to continuously evaluate all registered pesticides through an annual renewal and reevalution scheme. Cal. Food & Agric. Code § 12824 (requiring that "[a]ll pesticides for which renewal of registration is sought also shall be evaluated in accordance with this section"). Consistent with this mandate, section 6215 of the Department's regulations – the section governing annual renewals – requires the Department, in making a renewal decision, to consider

whether information submitted to the Department warrants reevaluation of the pesticide. If the Department chooses to "renew[] a pesticide registration without a reevaluation," the "director shall . . . make a written finding that he or she has not received sufficient information necessitating reevaluation[.]" 3 C.C.R. § 6215(c). Reevaluation is required where the Department's investigation "indicates a pesticide may have caused, or is likely to cause, a significant adverse impact." *Id.* § 6220.

Section 6215(c), in other words, makes the decision whether to put a pesticide into reevaluation an integral part of annual renewals. Each time the Department renews a pesticide, it must either initiate reevaluation or it must make a written finding that reevaluation is not necessary based on the evidence it has received. "[T]he whole of [the] action" encompasses both.[6] CEQA Guidelines § 15378.

The procedural history shows this to be the case with respect to the challenged agency decisions. The project here began in November 2017, when the Department solicited comments on its proposal to

[6] The Department attacks a strawman when it argues that the whole of the action could not include "the initial approval of the registration" in 2004 "and the annual renewals" that followed it. Dept. Br. at 27-29. This is not Raptors' position. Rather, the whole of the action consists of the Department's decision to renew diphacinone for calendar year 2018 without reevaluation.

renew all seven anticoagulant rodenticides for calendar year 2018 pursuant to section 6253 of its regulations. AR 03164 (citing 3 C.C.R. § 6253). Raptors timely submitted comments in response to this notice, attaching evidence of significant adverse effects of the anticoagulant rodenticides, including diphacinone, on non-target wildlife. AR 03176-03228. It expressly directed its comments at the section 6215(c) requirement that the Department make a finding whether reevaluation is warranted as part of pesticide renewal. AR 03167. And it formally requested that the Department initiate reevaluation of each of the rodenticides. AR 03174-75. In its April 18, 2018 notice of final decision, the Department acknowledged the comments submitted by Raptors but nevertheless elected to "proceed[] with the renewal of" all seven rodenticides without "placing them into reevaluation at [that] time." AA 111-12, AR 03504-05.

The Department did not, however, issue the Investigation Report required by its regulations (3 C.C.R. § 6254) until November 2018, at which time the Department reversed course, issuing a superseding proposed decision to initiate reevaluation of the second-generation anticoagulant rodenticides ("SGARs") but not the first-generation anticoagulant rodenticides ("FGARs"). AR 03549-51. The Investigation Report and accompanying documents analyzed the same comments

and evidence submitted by Raptors in response to the November 2017 notice of intent to renew. *See* AR 03514 ("[T]his report analyzes the data and exhibits submitted to DPR by Mr. Graf" on December 22, 2017); AR 03545.

The November 2018 Investigation Report and decision were therefore clearly related to – and indeed necessitated by – the Department's renewal activities. Section 6215(c) required the Department to make a written finding whether reevaluation was warranted by Raptors' evidence. That the Department took nearly a year to complete its review of the evidence does not sever its eventual decision on reevaluation from the renewal that precipitated it.

The Department addresses neither its own regulations nor the history of the challenged decisions in proffering its truncated definition of the project at issue. Instead, the Department relies on a series of cases that stand for the settled but inapposite proposition that "CEQA does not apply to projects which a public agency rejects or disapproves." CEQA Guidelines § 15270(a); *see Las Lomas Land Co. v. City of Los Angeles*, 177 Cal. App. 4th 837, 848-49 (2009); *Main San Gabriel Basin Watermaster v. State Water Res. Control Bd.* ("*Main San Gabriel*"), 12 Cal. App. 4th 1371, 1383 (1993).[7] Here, however, the

[7] The Department also cites *Sunset Sky Ranch Pilots Ass'n v. County of*

Department *approved* the project, affirmatively renewing diphacinone's registration without placing the compound into reevaluation. *See* AR 03242, 03549, 03583, 03587-89; AA 112. This approval amounted to "affirmative agency action altering the status quo" and thereby necessitating CEQA review. *Main San Gabriel*, 12 Cal. App. 4th at 1383. But for the renewal, diphacinone's registration would have lapsed and use of the pesticide would have been unlawful. *See* Cal. Food & Agric. Code §§ 12817, 12995.

B. The Department's Additional Efforts to Evade CEQA Are Unavailing

The Department makes several further attempts to get around CEQA. None are availing. First, the Department suggests in passing that its "consideration of annual renewals of registrations is treated as a ministerial action" and is exempt from CEQA on this basis. Dept. Br. at 13. But the Department identifies no authority for this proposition, and none exists. To the contrary, the only case the Department cites – *Protecting Our Water & Env't Res. v. County of Stanislaus* ("*Protecting*

Sacramento, 47 Cal. 4th 902 (2009), in which the Court rejected the argument that closure of an airport by its private owners following an agency's denial of a permit for continued operation was part of a CEQA "project." The Court's decision in that case turned on the fact that closure was a wholly private action neither financed nor made directly by a public agency and therefore could not be part of the CEQA project. *Id.* at 908 (citing Cal. Pub. Res. Code § 21065(c)). Not so here.

Our Water"), 10 Cal. 5th 479 (2020) – concerned county well construction permits rather than pesticide renewals, and its reasoning undercuts the Department's argument.

The Court in *Protecting Our Water* set forth a "functional" test to distinguish ministerial from discretionary projects: "[A] decision is ministerial if the agency has no discretionary authority to deny or shape" the project or "to address *environmental* impacts," whereas a project is discretionary if the "agency is empowered to disapprove or conditionally approve . . . based on environmental concerns that might be uncovered by CEQA review." *Id.* at 494. The Department's renewals are clearly the latter. The Department has discretion to deny or condition renewals in any number of ways based on environmental concerns: It could, for instance, renew *with* reevaluation (3 C.C.R. §§ 6215(c), 6220), call for a hearing to determine whether the application should be reconsidered or denied (3 C.C.R. § 6215(b); Cal. Food & Ag. Code § 12816), or cancel the registration (3 C.C.R. § 6215(b); Cal. Food & Agric. Code § 12825). The Department must also consider feasible alternatives and mitigation measures to reduce identified adverse impacts of its proposed projects, including renewals, and document that consideration in its public reports. 3 C.C.R. § 6254. And even if some renewal projects, or aspects of them, could be considered

ministerial, this one cannot, as the Department had ample discretion to shape the project based on the evidence presented by Raptors. *See* CEQA Guidelines § 15268(d) (project that "contains elements of both a ministerial action and a discretionary action . . . will be deemed discretionary"); *Protecting Our Water*, 10 Cal. 5th at 497 ("[A]ny doubt whether a project is ministerial or discretionary should be resolved in favor of the latter characterization." (citation omitted)).

Second, the Department argued below that *Californians for Alternatives to Toxics v. California Department of Pesticide Regulation* ("*CATS*"), 136 Cal. App. 4th 1049 (2006), deemed CEQA inapplicable to renewal decisions. AA 133-36. It did not. The relevant holding in *CATS* concerned the "*timing* of renewals" – and specifically whether the Department was required to consider comments seeking reevaluation prior to renewal. 136 Cal. App. 4th at 1065 (emphasis added); *see also PANNA*, 16 Cal. App. 5th at 242 (describing *CATS*). In holding that it was not, *CATS* reasoned that section 6215(c), while requiring a finding on reevaluation in conjunction with renewal, gave the Department the flexibility to complete its review of all available evidence outside the sixty-day time frame supplied by section 6215(a) and initiate reevaluation once that review was complete. *CATS*, 136 Cal. App. 4th at 1066; *see also id.* (section 6215(c) "does not require the Department to

make a hasty decision regarding possible reevaluation"). The *CATS* court did not consider the issue presented here: whether CEQA's substantive standards would apply to that eventual evidentiary review. *See PANNA*, 16 Cal. App. 5th at 242 (*CATS* "did not address CEQA's substantive requirements"). And of course they would, as the certified regulations tie the 2018 Investigation Report to the 2018 decisions on diphacinone's renewal and reevaluation as one approved CEQA project. 3 C.C.R. §§ 6215(c), 6220, 6252-55; *see County of Ventura*, 24 Cal. App. 5th at 385-86.

Finally, the Department suggests that Raptors waived its argument that the November 2018 reevaluation decision was part of the 2018 renewal project for CEQA purposes when Raptors stipulated to dismissal of its first cause of action and declined to appeal. Dept. Br. at 27. But the stipulation says nothing of the sort. RA 002. Raptors' first cause of action had restated the claims in its first amended petition challenging the Department's April 2018 decision to renew without reevaluation. RA 002; AA 168-69. The Superior Court held those claims foreclosed by *CATS*' holding on the timing of renewals and granted the Department's demurrer on that basis. AA 143-44. The stipulation reflects only that Raptors elected to preserve judicial resources by declining to replead a previously dismissed claim. And its

decision not to appeal that dismissal reflects that Raptors has directed its challenge at the entire CEQA project – the 2018 renewal of diphacinone with the related November 2018 Investigation Report and superseding decision on reevaluation it supported.

II. The Department and Intervenors Misapply the Standard of Review

In its opening brief, Raptors explained that the trial court erred by applying an incorrect standard of review to Raptors' CEQA claims. In evaluating whether an agency complied with CEQA, the court reviews the agency's actions for prejudicial abuse of discretion. Cal. Pub. Res. Code § 21168.5. An agency abuses its discretion by either: (1) failing to proceed in the manner CEQA provides, or (2) reaching factual conclusions unsupported by the evidence. *Sierra Club v. County of Fresno* ("*Sierra Club*"), 6 Cal. 5th 502, 512 (2018). The former is reviewed de novo; the latter for substantial evidence. *Id*. Below, the court ignored this important distinction, wrongly applying a substantial evidence standard to all claims raised in this case. AA 422-23.

The Department pretends that this error does not matter because this Court reviews both the agency's action and the administrative record de novo on appeal. Dept. Br. at 22; *see PANNA*, 6 Cal. App. 5th at 237 (court of appeal "review[s] the agency's action, not

the trial court's decision"). But this error does matter: In exercising its independent review of the agency's decisionmaking, this Court must apply the correct CEQA standard to each of Raptors' claims. And "[j]udicial review of these two types of errors differs significantly." *Sierra Club*, 6 Cal. 5th at 517. The court exercises independent review of the agency's alleged failures to comply with CEQA procedures, "scrupulously enforcing all legislatively mandated CEQA requirements"; by contrast it "accord[s] greater deference to the agency's substantive factual conclusions." *Id.* (citations omitted).

Just as the trial court did, the Department and Intervenors get the standard wrong, acknowledging the distinction between review for errors of law versus fact (Dept. Br. at 20), but nonetheless assuming that a substantial evidence standard applies to each of Raptors' claims. *See, e.g.*, Dept. Br. at 21 (urging deference); *id.* at 32 ("The Department found, and had substantial evidence for, no significant adverse effect from diphacinone."); Int. Br. at 7 ("DPR's analysis was supported by substantial evidence."). This mistake leads the Department and Intervenors, like the trial court below, to the wrong conclusions about the soundness of the Department's environmental review and should not be repeated on appeal.

As described below, Raptors' claims in this case are predominantly ones of legal error for which de novo review is appropriate. *See Sierra Club*, 6 Cal. 5th at 516. First, Raptors claims that the Department failed to proceed as required by law by neglecting to include *any* cumulative impact analysis in its environmental review of the project, much less an adequate one. "[T]he agency has no discretion" whatsoever as to such legal requirements, and failure to comply with the CEQA requirement to conduct a cumulative impact analysis is sufficient grounds to set aside a project approval. *Sierra Club*, 6 Cal. 5th at 612; *see also PANNA*, 16 Cal. App. 5th at 251 (setting aside project approval for failure to conduct adequate cumulative impact analysis).

Second, Raptors claims that the Investigation Report was informationally defective because, among other things: It lacked any meaningful analysis of adverse effects attributable to diphacinone; it omitted important evidence of these adverse effects from its analysis; and its portrayal of key studies and data was flawed and misleading. Claims that "a description of an environmental impact is insufficient because it lacks analysis or omits the magnitudes of the impacts" are not "substantial evidence question[s]." *Sierra Club*, 6 Cal. 5th at 514. Rather, the court considers independently, and without deferring to

the agency's judgments, whether an environmental review "omits material necessary to informed decisionmaking and informed public participation." *Id.*; *see also John R. Lawson Rock & Oil, Inc. v. State Air Res. Bd.*, 20 Cal. App. 5th 77, 96 (2018) ("When the informational requirements of CEQA have not been met, an agency has failed to proceed in a manner required by law[.]"). This includes whether the Department provided an adequate "disclosure of the analytic route . . .the agency traveled from evidence to action." *Sierra Club*, 6 Cal. 5th at 514 (citation omitted).

Despite the Department's suggestions otherwise (*see* Dept. Br. at 35), "harmless error analysis is inapplicable" to claims that an environmental review is informationally defective. *Sierra Club*, 6 Cal. 5th at 520. Rather, "case law is clear that, in such cases, the error is prejudicial." *Id.* (citing cases); *see also* Cal. Pub. Res. Code § 21005(a) ("[N]oncompliance with the information disclosure provisions of [CEQA] . . . or noncompliance with substantive requirements . . . may constitute a prejudicial abuse of discretion . . . regardless of whether a different outcome would have resulted if the agency had complied with those provisions."); *PANNA*, 16 Cal. App. 5th at 251-52 (ordering that approval of pesticide label amendment be set aside due to agency's failure to adequately consider cumulative impacts).

III. The Department Committed Clear Legal Error by Failing to Perform a Meaningful Cumulative Impact Analysis

In its opening brief, Raptors explained that the Department's failure to conduct *any* cumulative impact analysis, let alone a substantively meaningful one, is legal error necessitating entry of mandamus relief. Opening Br. at 51-57. The Department makes three arguments in response, each of which is unavailing. First, the Department vaguely suggests that a lower standard of CEQA compliance applies to cumulative impact analyses under its certified regulatory program. The Department is wrong, and *PANNA*'s thorough discussion of the standards for cumulative impact analysis resolves any doubt. Second, the Department claims that it did perform a cumulative impact analysis, an argument that Intervenors join. But there is no such analysis to be found in the record, and the Department cannot retroactively manufacture one by cobbling together unresponsive citations to the record. Finally, and in contradiction to its second argument, the Department suggests that there was no scientific information on additive or interactive effects before it that could have permitted it to make meaningful disclosures regarding cumulative impacts. This argument, too, is unsupported by the record, and the Department's failure to meaningfully engage the plentiful evidence of cumulative impacts is contrary to law.

A. CEQA's Requirements for a Substantively Meaningful Cumulative Impact Analysis Apply to Certified Regulatory Programs

As an initial matter, Intervenors recycle an argument advanced by the Department itself in *PANNA* and flatly rejected by this Court when they suggest that the Department "need only comply with its own regulations" rather than with CEQA. Int. Br. at 9; *see PANNA*, 16 Cal. App. 5th at 240, 242-43. Section 21080.5(c) of CEQA specifies that although certified regulatory programs are "exempt from the requirements for preparing EIRs, negative declarations, and initial studies," such programs "remain[] subject to [all] other provisions in CEQA." CEQA Guidelines § 15250 (citing Cal. Pub. Res. Code § 21080.5); *see Mountain Lion Found.*, 16 Cal. 4th at 114 (same). *PANNA* applied this rule to the Department's certified pesticide regulatory program, holding that the program – "and the environmental review documents" the Department prepares under it – "remain subject to the broad policy goals and substantive standards of CEQA not affected by the limited exemption set forth in section 21080.5, subdivision (c)." *PANNA*, 16 Cal. App. 5th at 242. This includes the requirement to conduct a cumulative impact analysis. *Id.* at 248-49 (citing authorities).

The Department and Intervenors next invent a meaningless dispute about the standards applicable to cumulative impact analyses

under certified regulatory programs. Respondents reject any reliance on case law that considered a cumulative impact analysis in the context of an EIR. Dept. Br. at 31; Int. Br. at 12 n. 4. But Intervenors themselves rely on this same case law. *See, e.g.*, Int. Br. at 14 (likening the Department's purported cumulative impact analysis to that upheld in the EIR considered in *San Francisco Baykeeper, Inc. v. State Lands Comm'n*, 242 Cal. App. 4th 202 (2015)). As have the courts when evaluating the sufficiency of a cumulative impact analysis under a certified regulatory program. *See, e.g.*, *Joy Road Area Forest & Watershed Ass'n v. Cal. Dept. of Forestry & Fire Protection*, 142 Cal. App. 4th 656, 680 (2006) (examining *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* ("*Laurel Heights*"), 47 Cal. 3d 376, 396 (1988)); *Env't Protection Info. Ctr., Inc. v. Johnson*, 170 Cal. App. 3d 604, 625 (1985) (citing CEQA Guidelines § 15130).

This borrowing of cumulative impact standards from EIR cases for review of certified regulatory program documents is both proper and unsurprising. Aside from certain procedural requirements specific to an EIR's cumulative impact analysis supplied by section 15130 of the CEQA Guidelines, core CEQA standards governing these analyses apply equally in both contexts. *See, e.g.*, Cal. Pub. Res. Code § 21083(b)(2) ("significant effect on the environment" exists where "[t]he possible

effects of a project are individually limited but cumulatively considerable"); CEQA Guidelines § 15355 (defining "cumulative impacts"). And the foundational importance of cumulative impact analyses is universal for "*any* environmental inquiry subject to CEQA's broad policy goals." *Laupheimer v. State of California*, 200 Cal. App. 3d 440, 462 (1988).

The Department and Intervenors also quibble that the "contours" of a cumulative impact analysis under a certified regulatory program are "more relaxed than [for] the analysis typically required in an EIR." Int. Br. at 9; *see* Dept. Br. at 31. But neither party attempts to explain which requirements are relaxed or how that might be meaningful to this case.[8]

In any event, this Court in *PANNA* provided clear and controlling standards for the Department's cumulative impact analysis under its certified pesticide regulatory program. The agency's environmental

[8] Intervenors cite *PANNA* for the proposition that the requirements for a cumulative impact analysis are "relaxed" for certified regulatory programs (Int. Br. at 9), but *PANNA* did not so hold. Rather, *PANNA* used this language to distinguish its expectations for the Department's cumulative impact analysis from the "more relaxed" expectations for a Department of Forestry cumulative impact analysis described by the Sixth Appellate District three decades prior in *Laupheimer*. *See* PANNA, 16 Cal. App. 5th at 250 (noting that the cumulative impact analysis before it would have failed "[e]ven under the more relaxed expectation for such an analysis described in *Laupheimer*").

review documents must adequately analyze the impacts of a proposed action on a pesticide in combination with the effects of the Department's other "past, present, and future decisions." *PANNA*, 16 Cal. App. 5th at 250. This analysis must "be substantively meaningful" and demonstrate "adequacy, completeness and a good faith effort at full disclosure." *Id.* The information must also be presented in a way that is "useful to decision makers and the public." *Id.* A cumulative impact analysis which "understates information concerning the severity and significance of cumulative impacts impedes meaningful public discussion and skews the decision maker's perspective concerning the environmental consequences of the project, the necessity for mitigation methods, and the appropriateness of project approval." *Id.* Failure to meet these standards is a prejudicial abuse of discretion and will require that the environmental document and project approval be set aside. *See id.* at 251; Section II, *supra*.

B. The Department Violated CEQA by Failing to Perform Any Cumulative Impact Analysis

Here, the Department failed to conduct a cumulative impact analysis at all, let alone the substantively meaningful one required by *PANNA*. Nowhere in the Department's Investigation Report or notices of decision is there a single mention of the term "cumulative impact" or

any plausible description of environmental effects of the Department's decision to renew diphacinone without reevaluation when considered in the context of its renewals for the six other anticoagulant rodenticides. This is so despite the Department's acknowledgement in its Investigation Report that all seven rodenticides "share a similar mechanism of action" (AR 03553) and that non-target wildlife are commonly exposed to a cocktail of multiple anticoagulant rodenticides in the wild.[9] And it is despite evidence in the administrative record that multiple anticoagulant exposures are a statistically significant predictor of severe mange,[10] as well as evidence that mange associated with anticoagulant rodenticide exposures as a group has been the "proximate cause" of bobcat population declines (AR 03213) – which the Department itself identified as a "severe population level adverse effect" (AR 03569).

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[9] See, for instance, AR 03565 (fishers that died of anticoagulation intoxication were exposed to an average of two and up to five anticoagulants); AR 03221 (77 percent of all bobcats tested and 87 percent of those exposed to anticoagulants showed presence of at least two anticoagulants in their livers); *id.* (among bobcats who had both blood and livers sampled for anticoagulants, bobcats were most frequently exposed to three or more compounds).

[10] *See* AR 03225 (recording a "strong association" between exposure to two or more compounds and severe mange and finding that bobcats were 7.3 times more likely to die with severe mange than without if they were exposed to two or more anticoagulants, diphacinone among them).

At minimum, CEQA required the Department to evaluate this and other evidence presented to the agency to determine whether there was a reasonable probability that the incremental impact of the project would be significant when added on top of the cumulative impacts of past, present, and foreseeable future approvals for the other anticoagulant rodenticides. CEQA Guidelines § 15355. The Department's failure to do so is even more obvious than in its review set aside by *PANNA*, where the Department had at least stated its conclusion that the addition of crops to two neonicotinoid products would "not result in new significant . . . cumulative impacts to honeybees." *PANNA*, 16 Cal. App. 5th at 250. Here, the Department has not even provided the "one-sentence response" on cumulative impacts that *PANNA* found deficient, not to mention the "adequa[te], complete[], and . . . good faith effort at full disclosure" that the law requires. *Id.*

In response to this obvious deficiency, the Department and Intervenors attempt to resuscitate the Department's environmental review by pointing to locations in the record where they pretend a phantom cumulative impact analysis is hidden. Dept. Br. at 31-32; Int. Br. at 10-12. It is not there.

The Department points to: (1) data tables and a chart summarizing anticoagulant exposure rates based on non-representative state wildlife loss reports[11] and two wildlife databases (AR 03518, 03522, 03525); (2) trend lines showing anticoagulant exposure rates over time based on the same non-representative state loss reports (AR 03519-22); and (3) a summary of the Department's takeaways from the 2015 Urban Bobcat Study submitted by Raptors (AR 03529-31). But in none of these locations is there the slightest mention of cumulative impacts, or any functional consideration of whether and to what degree the renewal of diphacinone without reevaluation may adversely impact wildlife when considered on top of the impacts of similar rodenticides. At best, the Department suggests that the public might intuit its own cumulative impact analysis from the raw data and record studies. But CEQA "requires more than raw data; it requires also an analysis that will provide decision makers with sufficient information to make intelligent decisions." *County of Amador v. El Dorado County Water Agency*, 76 Cal. App. 4th 931, 955 (1999); *see also PANNA*, 16 Cal. App. 5th at 250.

[11] The Department's reliance on these exposure rate summaries and trends is particularly ironic, given that the agency concluded in its Investigation Report that "limitations" in this data "preclude the analysis of trends or overall exposures." AR 03517.

Intervenors' attempts to locate a cumulative impact analysis in the Investigation Report fare no better. Intervenors cite to the Department's broad summaries of state data and studies submitted by Raptors, but none of these discussions analyze potential cumulative impacts. Int. Br. at 10-11. Even if, as the Department asserts and Intervenors imply, the Department had "looked at what [Raptors] requested" on cumulative impacts (Dept. Br. at 31), it was required to actually explain its analysis and conclusions from this evidence. *See PANNA*, 16 Cal. App. 5th at 250. It did not, and its environment review and project approvals must therefore be set aside. *Id.* at 251.

Ultimately, instead of evaluating whether diphacinone adversely affects wildlife when considered *on top* of the harms posed by related pesticide approvals (as CEQA requires), the Department did the opposite, evaluating the relative harms posed by artificial classes of rodenticides. Specifically, the Department first lumped diphacinone in with the other so-called FGARs to downplay its toxicity. *See* Section IV.A., *infra.* And then it discounted adverse effects of FGARs as a class by comparing them to SGARs in relative toxicity, bioaccumulation, and exposure rates. AR 03583.

This is the inverse of what CEQA requires for a cumulative impact analysis. As the court explained in *Kings County Farm Bureau v.*

City of Hanford ("*Kings County*"), 221 Cal. App. 3d 692, 718, the "relevant question . . . is not the *relative amount* of [damage posed] by the project when compared with preexisting [harms], but whether any additional [damage] should be considered significant in light of the serious nature" of the existing problem. By referencing diphacinone only in terms of its relation to the other anticoagulants rather than evaluating its cumulative contribution to an already significant problem, the Department unlawfully "trivialize[d] the project's impact." *Id.*

Intervenors relies on *San Francisco Baykeeper, Inc. v. State Lands Commission*, 242 Cal. App. 4th, to characterize the Department's use of these misleading comparisons as harmless. But *San Francisco Baykeeper* proves the opposite. There, an EIR included a thorough analysis and discussion of the potential cumulative contributions of a sand mining project to coastal erosion and sediment transport within the bay, which it supplemented through a quantified analysis of the relative rate of erosion that would likely be attributable to the project if approved. *Id.* at 221. Distinguishing *Kings County*, the court found that the agency's "irrelevant ratio" about relative erosion rates was at most only a "minor component" of the EIR's otherwise proper cumulative impact analysis. *Id.* at 223-24. Far from the thorough discussion of

cumulative impacts provided in *San Francisco Baykeeper*, the Investigation Report has no discussion at all. Rather, as in *Kings County*, the Department's comparison of diphacinone to other rodenticides "avoid[ed] analyzing the severity of the problem" rather than evaluating their "collective effect," as CEQA requires. 221 Cal. App. 3d at 721.

C. The Department's Contradictory Suggestion That There Was No Data to Inform a Cumulative Impact Analysis Fails

Belying Respondents' attempts to locate a cumulative impact analysis in the record, the Department also argues that there was so little data before it on potential cumulative impacts that it was justified in excluding the analysis altogether from its Investigation Report. This argument fails on both the law and the facts.

First, even if the Department was correct that it lacked sufficient data, its silence on cumulative impacts would still violate CEQA. Even *Laupheimer* admonished that an agency must, at minimum, "consider[] . . . concerns" about cumulative impacts "in good faith," and to the extent the agency deems the evidence "too remote or speculative" to warrant further analysis, it must "make the administrative record show the requisite consideration." 200 Cal. App. 3d at 467. The Department has not, and this Court "may not accept

appellate counsel's *post hoc* rationalizations for [the Department's] action." *S. Cal. Edison Co. v. Pub. Utils. Comm'n*, 85 Cal. App. 4th 1086, 1111 (2000) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 50 (1983)).

Second, the Department's assertions that there was "no scientific information" available to assess diphacinone's potential additive or interactive effects and "nothing more for the Department to reasonably do" are contradicted by the record.[12] Dept. Br. at 32. The cherry-picked quotation from the 2015 Urban Bobcat Study on which the Department relies for its litigation position states only that the "*degree*" of additive or interactive effects between diphacinone and SGARs was then "unknown" (AR 03226 (emphasis added)), but this study and others that followed provide ample evidence of the *existence* of such combined effects. *See, e.g.*, Opening Br. at 23 n.2, 61 n.13 (describing evidence from lab studies of adverse impacts from exposures to multiple anticoagulants, including diphacinone); Section IV.B, *infra* (describing similar evidence from bobcat studies). Regardless whether

[12] The Department's implication that any failure to conduct cumulative impact analysis was not prejudicial (*see* Dept. Br. at 32) is foreclosed by the case law. As discussed above, harmless error defenses are inapplicable to failures to comply with CEQA's procedural and substantive requirements. *See* Section II, *supra*; S*ierra Club*, 6 Cal. 5th at 515.

the precise degree of interaction is known, "as a matter of law the showing of record was sufficient at least to have put [the agency] on notice of potential cumulative environmental effects" so as to trigger further evaluation. *Laupheimer*, 200 Cal. App. 3d at 465.

Finally, the Department misrepresents the law with its cribbed proposition that a cumulative impact analysis need only consider interactions between diphacinone and other rodenticides in the bodies of animals with multiple exposures. Dept. Br. at 32. Rather, the agency must also consider whether incremental impacts of diphacinone exposures are cumulatively significant when considered against the backdrop of mange-related population crashes and other adverse effects on non-target wildlife that the Department has traced to anticoagulants. Indeed, "the greater the existing environmental problems are, the lower the threshold should be for treating a project's contribution to cumulative impacts as significant." *Cmtys. for a Better Env't v. Cal. Res. Agency*, 103 Cal. App. 4th 98, 120 (2002).

IV. The Department's Discussion of Key Data Fails to Meet CEQA's Basic Informational Standards

The Investigation Report suffers from a number of fatal informational defects beyond the total absence of a cumulative impact analysis. Among them, it fails to specifically analyze the adverse effects associated with the project at issue because it treats FGARs as a

uniform class; it omits any mention of material evidence from multiple studies about the particular risks associated with diphacinone; and it relies on FGAR trend data that it admits is unsuited to that very purpose. The resulting record "does not adequately apprise all interested parties of the true scope of the project for intelligent weighing of the environmental consequences" and therefore fails CEQA's most fundamental purpose of ensuring "informed decisionmaking." *Cmtys. for a Better Env't v. City of Richmond*, 184 Cal. App. 4th 70, 82-83 (2010).

On appeal, the Department and Intervenors dispute the implications of the science and defend the agency's ultimate decision under a substantial evidence standard. But whatever obscure readings of the science the Department proffers in its brief are irrelevant, as CEQA required the agency to set forth its analytic route in its Investigation Report. *See Sierra Club*, 6 Cal. 5th at 513. And whether substantial evidence might support the Department's ultimate conclusions "is not relevant when one is assessing a violation of the information disclosure provisions of CEQA." *Cmtys. for a Better Env't*, 184 Cal. App. 4th at 83. Individually and collectively, these

informational errors render the Department's analysis legally defective and require that it be set aside.[13]

A. By Lumping Diphacinone in with the FGARs, the Department Impermissibly Obscures Its Impacts on Wildlife

As Raptors points out in its opening brief, the Investigation Report failed to consider the potential adverse effects of the project at issue: the renewal of diphacinone without reevaluation. *See* Opening Br. at 47. Rather, the Report lumped diphacinone in with other less harmful first-generation compounds and analyzed them as an undifferentiated class, obscuring record evidence of the specific risks diphacinone poses to the environment. *See id.* at 58-63; AR 03583. In doing so, the Department violated its own certified regulations (which require consideration of significant adverse effects associated with *each individual pesticide* (3 C.C.R. §§ 6220, 6215(c))), and it violated CEQA's core informational disclosure requirements (which require consideration of the direct and indirect environmental effects of the *specific proposed project* at issue). S*ee, e.g.*, Cal. Pub. Res. Code § 21083(b); *Santiago County. Water Dist. v. County of Orange* (1981)

[13] As explained in Section V, *infra*, the record contains substantial evidence of diphacinone's adverse effects on non-target wildlife. For that reason, the Department's decision should be set aside even under a more deferential substantial evidence standard of review.

118 Cal. App. 3d 818, 829 ("[T]he ultimate decision of whether to approve a project . . . [i]s a nullity if based upon an EIR that does not provide the decision-makers, and the public, with the information about the project that is required by CEQA.").

The Department makes three contradictory arguments in an effort to brush this error aside. First, the Department asserts that Raptors induced the agency's error by grouping diphacinone with the other anticoagulants in its administrative request for reevaluation. This argument is foreclosed by the law and the facts. The Department – not the public – bears the onus to ensure compliance with the Department's obligations under CEQA and its certified regulations. *See PANNA,* 16 Cal. App. 5th at 247 (rejecting "the Department's contention that PANNA had the burden to identify feasible alternatives"); *see also, e.g.*, 3 C.C.R. § 6215(c) (requiring Department director to make a finding on reevaluation for each pesticide subject to renewal); *id.* § 6220 (setting forth duties of Department director in considering whether to reevaluate individual pesticides). Further, the sole authority on which the Department relies for its invited error defense – *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 403 (1999) – stands for the inapposite proposition that a party may not "mislead[] the trial court and then profit[] therefrom" on appeal.

This doctrine does not speak to an agency's independent responsibility to follow the law governing its own administrative decisionmaking processes. [14]

In any event, the Department's claim that Raptors did not seek reevaluation of diphacinone, but rather only of FGARs and SGARs as amalgamated classes, has no factual basis in the record. *See* Dept. Br. at 34. Raptors' request for reevaluation individually identified each rodenticide of concern – including diphacinone – and sought reevaluation for each. AR 03167, 03175. It presented data specific to diphacinone toxicity and adverse effects. *See, e.g.*, AR 03172 (documenting four-fold increase in "documented rodenticide poisonings from diphacinone"); AR 03174 ("a recent study on bobcats shows that the primary threat to bobcat survival was diphacinone"); AR 03232 (describing how prior testing was understating extent of contamination from diphacinone). And it attached studies documenting the specific environmental concerns attributable to widespread diphacinone sales, use, and exposures. *See* AR 03176-3238.

[14] Contrary to the Department's passing suggestion that Raptors waived this argument by failing to raise it below, Raptors urged this precise argument in its briefing on the merits before the Superior Court. AA 251-63.

Second, after blaming Raptors for its error, the Department denies that it erred at all. Dept. Br. at 34. But here too its defense is belied by the record. The Department points to the same summaries of data in the Investigation Report where it alleges a cumulative impact analysis was hidden: charts comparing toxicity values, half-lives, and exposure rates for the seven rodenticides (AR 03516, AR 03519, 03522-23, 03525),[15] as well as two charts of pesticide sales and use data (AR 03543-44). Dept. Br. at 34. Yet again the Department cannot point to any findings or conclusions it reached from this data about the specific adverse effects of diphacinone – because they do not exist in the record. Indeed, as Raptors explained in its opening brief, the data that the Department points to show just how quantifiably distinct diphacinone is from the other FGARs in toxicity and rates of sales, use, and exposure – and how much of a singular problem diphacinone is for non-target wildlife. Opening Br. at 60-63. Had the Department actually considered these data, it would have seen that diphacinone looks much more like the SGARs in its toxicity levels than the FGARs (*see, e.g.*, AR 0180-81, 03516), and that it stands out among all the anticoagulants in

[15] The Department points to several additional charts evaluating exposures rates based on non-representative state data, but these charts evaluate FGARs as a class and are not instructive on the particular characteristics of diphacinone. AR 03519-21.

sales and use rates as well as documented exposure rates as shown through blood samples (*see, e.g.*, AR 03226, 03442, 03522, 03543-44).

Finally, the Department misses the point of CEQA when it argues that individualized analysis of diphacinone was not required because "the public had the separated data available to evaluate." Dept. Br. at 34. An adequate response under CEQA "requires more than raw data; it requires also an analysis that will provide decision makers with sufficient information to make intelligent decisions." *County of Amador*, 76 Cal. App. 4th at 955. Thus, in *County of Amador*, the court rejected an agency's argument that an adequate description of baseline conditions could be inferred by "cobbling together information included in and appended to the EIR." *Id*. Rather, the court explained, "such an effort should not be necessary. . . . If, as defendants claim, the requisite information is included in the documentation . . . setting out that information in a clear analysis within the EIR should not pose any difficulty." *Id.* at 955-56. So too here.

In short, the Department's approach fails CEQA's fundamental purpose of ensuring a transparent and "meaningful review process." *See Laurel Heights,* 47 Cal. 3d at 382 (CEQA document is "a document of accountability," through which "the public will know the basis on which its responsible officials either approve or reject environmentally

significant action."). And the lack of any meaningful discussion or analysis examining extensive record evidence of adverse effects of diphacinone – the compound at issue – represents a prejudicial abuse of discretion. *See Joy Road*, 142 Cal. App. 4th at 676.

B. The Investigation Report Mischaracterizes Core Studies

As explained in Raptors' opening brief, the Investigation Report excluded important evidence about the adverse effects on non-target wildlife attributed to diphacinone, thereby "omit[ting] the magnitude of the impact" and rendering the document informationally defective in violation of CEQA. *County of Fresno*, 6 Cal. 5th at 514; *see* Opening Br. at 63-66, 70-73. Rather than try to defend its environmental analysis against these obvious informational deficiencies, the Department reverts to arguing that it "had substantial evidence" for its decision not to reevaluate diphacinone. Dept. Br. at 32. This is not responsive to Raptors' claims. *See* Section II, *supra.*

The Investigation Report's omissions are particularly obvious, and damaging, in its treatment of the urban bobcats studies. Among material evidence of the harms posed by diphacinone, the 2015 Urban Bobcat Study found that: (1) diphacinone was among the anticoagulants most frequently detected in liver samples (AR 03220);

(2) diphacinone was the compound detected most frequently in blood samples, at three times the rate of the SGARs (AR 03221); (3) the relative paucity of the blood sample data likely resulted in underestimation of the correlation between diphacinone exposure and severe mange (AR 03226); (4) exposure to multiple anticoagulants (including diphacinone) was nevertheless among the strongest predictors of severe mange (AR 03225); (5) in addition to sub-lethal impacts, secondary exposures of bobcats to FGARs like diphacinone "can be a direct source of mortality for some species"[16] (AR 03226); (6) "diphacinone may be the compound that bobcats encounter most frequently" in the study area (*id.*); and (7) unique among the anticoagulants, exposures to diphacinone increased significantly during the study interval (*id.*). The Investigation Report does not meaningfully analyze any of these findings. Nor does the Report meaningfully analyze the findings from follow-up studies based on bobcat blood data – in which diphacinone is the most commonly detected anti-coagulant – that demonstrate a "measurable and consequential sublethal effect of [anticoagulants] in a wild [bobcat]

[16] Tellingly, the Investigation Report quotes the first half of this sentence from the study (that diphacinone "is considered to pose less risk to nontarget wildlife than the more toxic [SGARs]"), while omitting the second half of the sentence, which acknowledges that the risk is nonetheless significant. *Compare* AR 03569 *with* AR 03226.

population." AR 03446; *see also* AR 03482 (concluding that study "provide[s] convincing evidence that sublethal exposure to [anticoagulants] has substantial and dramatic consequences for immune system regulatory genes in a wild carnivore population.").

The Department committed a similarly glaring error in its discussions of a 2004 owl study in the Investigation Report and accompanying letter to Raptors' counsel.[17] The Department states in these record discussions that there "were no mortalities and no observed sublethal effects in any of the [barn] owls that were fed rats exposed to FGARs." AR 03545, 03549. But it omits any mention that all four great-horned owls and saw-whet owls that were fed diphacinone-killed mice "displayed anticoagulant poisoning" and three of the four "died from massive hemorrhaging." AA 272. As with the bobcat studies, the Department's selective and misleading characterizations of the study's findings obscured the existence and magnitude of the very adverse impacts it was required to assess.

In litigation, the Department now attempts to cure these informational defects through even more misleading characterizations of the studies than it provided during the administrative process. For

[17] Indeed, the 2004 owl study was the *sole* study that the Department discussed at length in its letter to Raptors' counsel explaining the Department's refusal to reevaluate. AR 03549.

instance, it likens diphacinone to naturally occurring compounds like "urea" despite the overwhelming evidence of diphacinone's toxicity and its direct and sublethal implications. Dept. Br. at 33. It confidently declares that "the 2015 urban bobcat study shows with statistical robustness that it was [SGARs] – and not diphacinone – that were causing significant adverse effects," though the study reached no such conclusion.[18] *Id.* at 10. And it asserts that the Department was justified in excluding all evidence of deaths from diphacinone found in the 2004 study because the deaths occurred in a preliminary trial, though the

[18] The Urban Bobcat Study did not statistically prove that diphacinone and mange are uncorrelated. Rather, the study concluded that because the correlation tests could only be run on liver samples, the study could not provide a statistically sound and unbiased association test for diphacinone, which is primarily detected in blood samples. AR 03326, 03232-33; *see also* AR 03442 (bobcats exposed to diphacinone in 32 of 38 anticoagulant-positive blood samples). As the study's author explained in comments submitted to the Department: "[O]ne of our significant findings. . . is that we learned we have been underestimating . . . exposure to first-generation anticoagulants by relying solely on liver samples . . . . [A] lack of association between mange and first-generation anticoagulants could potentially be driven by a bias in the shorter tissue half-life of first-generation compounds compared to second-generation compounds." AR 03232. **Even despite this bias, the study still found an association between mange and cumulative anticoagulant exposures in liver, where diphacinone was the third most commonly detected anticoagulant.** *See e.g.*, AR 03219, Figure 2; AR 03221, Figure 4. And the Department still chose to reevaluate two of the four second-generation compounds – for which no statistical association was shown. AR 03223, 03225.

Department proffered no such justification in its public documents. *Id.* at 36. Even if the Department's *post hoc* readings of these studies were reasonable (they are not), the Department's attempt to rehabilitate its administrative record in litigation would fail. *See S. Cal. Edison Co.*, 85 Cal. App. 4th at 111 (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50) (court "may not accept appellate counsel's *post hoc* rationalizations for [the agency's] action").

C. The Department Improperly Relies on Admittedly Flawed Trend Data

The Department and Intervenors repeat these mistakes in defending the Investigation Report's reliance on its finding of "a general downward trend in FGAR exposure rates." AR 03545; *see* Dept. Br. at 37-38; Int. Br. at 14. As Raptors illustrates in its opening brief, the Report's logic is flawed. *See* Opening Br. at 67-70. Among other things, the trend analysis is a glaring example of the Department's legal error in lumping diphacinone together with the other FGARs and examining the class as a monolith. The trend analysis is drawn from non-representative loss reports that the Investigation Report itself disclaims for that very purpose. AR 03555 (finding that "[t]here are several limitations in the loss reports provided to DPR that preclude the analysis of trends or overall exposure"); *see also* AR 03562 (same); *see also* Dept. Br. at 38. And by exclusively relying on the loss reports,

the Department obscures the data showing stable or *increasing* rates of sales and use of diphacinone and of exposures to the compound by non-target wildlife. *See, e.g.*, Opening Br. at 35, 69; AR 03213 (diphacinone prevalence and exposure uniquely increased during study period); AR 03581-82 (diphacinone sale and use trends); *see also* AR 03147, 03544.

Unable to defend these defects, the Department and Intervenors *again* resort to the wrong standard, arguing about whether the Report's conclusions were supported by substantial evidence. Dept. Br. at 37; Int. Br. at 14. But *again* this is not responsive to Raptors' charge that the Department violated CEQA's informational disclosure requirements in omitting and obscuring analysis of the relevant evidence showing increasing rates of sales, use, and exposures for the compound at issue.

V. The Department's Ultimate Conclusions Are Not Supported by Substantial Evidence

The Department declines to respond to what it characterizes as Raptors' "throw-away substantial evidence" arguments.[19] Dept. Br. at 39. They are not. Aside from the many fatal legal defects in the

[19] Indeed, the Department's assertion that it responded to Raptors' substantial evidence arguments elsewhere in its brief underscores its conflation of the applicable standards of review. *See* Dept. Br. at 39.

Department's analysis, the lack of substantial evidence to support the Department's ultimate conclusions independently requires that its project approvals be set aside.

While substantial evidence review is a more deferential standard than applied to the agency's legal claims, it is not without teeth. Substantial evidence means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion." CEQA Guidelines § 15384. The evidence relied on must be "reasonable in nature, credible, and of solid value." *Stanislaus Audubon Soc'y, Inc. v. County of Stanislaus*, 33 Cal. App. 4th 144, 152 (1995). "Speculation, unsubstantiated narrative, and evidence that is clearly erroneous or inaccurate does not constitute substantial evidence." CEQA Guidelines § 15384. Ultimately, if examining the "whole record" before the Department, "a fair argument can be made that the project may have a significant effect on the environment" (*id.*), then the project approval must be set aside and diphacinone put into reevaluation. 3 C.C.R. § 6220 (reevaluation required where reported episodes and information "indicate that a pesticide may have caused, or is likely to cause a significant adverse effect"); *see PANNA*, 16 Cal. App. 5th at 246 ("fair argument" standard applies to reevaluation).

Here, substantial evidence supports far more than a "fair argument" that diphacinone is causing significant adverse effects for non-target wildlife, on its own and in combination with related project approvals. Record evidence shows that non-target wildlife are frequently exposed to a cocktail of anticoagulant rodenticides that share common modes of toxicity. AR 00179-81; 03225. Numerous necropsy reports in the record considered by the agency evidence diphacinone's ability to sicken and kill exposed wildlife, both independently and in concert with other rodenticides. *See* Opening Br. at 61 n. 13; SAR 4408-53. The 2015 Urban Bobcat Study documents the strong correlation between severe manage and exposures to multiple anticoagulants, including diphacinone. *See* AR 03443-46. Moreover, that study found diphacinone to be by far the most prevalent anticoagulant detected in the blood samples of a declining California bobcat population plagued with mange. AR 03226 (concluding that "diphacinone may be the compound that bobcats encounter most frequently"); *see also* AR 03221, Figure 4 (finding diphacinone to be third most prevalent of all seven anticoagulants using combined liver and blood sample data). And follow-up studies from 2017 and 2018 observe an alarming degradation of immune system function and downregulation of genes controlling immune

function among bobcats with blood contaminated predominantly by diphacinone. AR 03439, 03468. This and other reliable scientific evidence are in accord with the U.S. Environmental Protection Agency's conclusion based on a large meta-analysis that diphacinone poses the *greatest* secondary risk of all anticoagulants to non-target mammal species. *See* Opening Br. at 75; AR 00180-181.

The Department's conclusions otherwise are unsupported. As evidence for its conclusion that FGARs are not causing or likely to cause adverse effects to non-target wildlife, the Department cited the 2004 owl study, declining FGAR exposure rates, and chemical characteristics differentiating FGARs from SGARs. AR 03545, 03549. But it now freely admits that the owl study says little about diphacinone's impacts on mammals and that the data the Department relied on for exposure trends were non-representative and unsuited to that purpose. Dept. Br. at 35, 38; *see also* Int. Br. at 14; AR 03555. Its inference that diphacinone looks more like the FGARs than the SGARs in toxicity traits and exposure rates is also clearly erroneous. *See* Opening Br. at 59; AR 03554 (documenting that diphacinone is more toxic than all SGARs except brodifacoum); AR 03226 (documenting that diphacinone was the most commonly detected anticoagulant in bobcat blood samples). None of this evidence is substantial under CEQA, and

it cannot sustain the Department's decision to renew diphacinone without reevaluation.

Nor can the Investigation Report's misleading characterization of the 2015 Urban Bobcat Study as showing "statistically significant associations between SGARs and mange but not between FGARs and mange." *See* Dept. Br. at 33 (quoting AR 03232). As an initial matter, the study did not even test for associations between FGARs or SGARs as groups and mange, as the Investigation Report implies. AR 03224. Rather, it evaluated the relationship between mange and individual compounds in liver samples, as well as between mange and the total number of compounds detected in those samples. Contrary to the Department's assertion that mange and diphacinone are uncorrelated (Dept. Br. at 10), the study identified a *statistically significant positive association* between severe mange and exposures to multiple anticoagulants, one of which was diphacinone (the third most commonly detected anticoagulant in liver samples). AR 03224. Further, as discussed in Section IV.B above, the study's author explained that the association tests were likely biased against identifying associations with diphacinone, which is under-detected in the liver samples on which the tests were run but was the most frequently detected compound in anticoagulant-positive bobcat blood

samples.[20] *See* Section IV.B at 46, n. 17, *infra*. Contrary to the Department's use of the 2015 Urban Bobcat Study, the study's findings are among the substantial evidence that diphacinone is individually and cumulatively contributing to adverse impacts on non-target wildlife.

VI. Real Parties' Brief Is Irrelevant and Improper

Real Parties in Interest have provided the Court with a twenty-eight-page policy discussion directed at the cost-benefit analysis they contend underlies the Department's pesticide regulatory decisions. But this Court's role is not to exercise discretion that belongs to the Department: Its role is to determine whether the Department has abused its discretion through project approvals that violated governing law or were unsupported by the facts. Real Parties' brief does not speak to these questions and should therefore be disregarded. So too should Real Parties' Appendix and discussion of the material contained therein. As Real Parties concede, the trial court rejected their motion to augment the record with these documents under Public Resources Code section 21167.6(e) (AA 384, 426), and Real Parties have made no

[20] The authors did not make similar qualifications about under-detection of the SGAR bromadiolone, which the Department put into reevaluation despite the study's failure to document any significant association between that individual compound and mange.

attempt to show that the trial court erred in doing so. *See Consol. Irrigation Dist. v. City of Selma*, 204 Cal. App. 4th 187, 198 (2012) (holding that review of trial court's decision on motion to augment under section 21167.6(e) is reviewed for substantial evidence rather than de novo).

CONCLUSION

The Department maintains on appeal, as it did below, that its renewal of diphacinone without reevaluation is not subject to CEQA. This argument is both wrong and revealing: It makes abundantly clear that the Department did not take its CEQA obligations seriously, or likely consider them at all, when it decided to renew diphacinone without reevaluation. Raptors respectfully requests that the Court remedy this error by reversing the trial court's decision and directing entry of the requested writ of mandate.

Date: Nov. 4, 2021

Respectfully submitted,

ENVIRONMENTAL LAW CLINIC
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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c) of the California Rules of Court, I certify that the text of this brief consists of 10,577 words, not including tables, signature blocks, and required certificates, as counted by Microsoft Word, the computer word processing program used to generate the brief.

Dated: November 4, 2021

Deborah A. Sivas

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SANTA CLARA

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Santa Clara, State of California. My business address is Crown Quadrangle, 559 Nathan Abbott Way, Stanford, CA 94305-8610.

On November 4, 2021, I served true copies of the following document(s) described as **APPELLANT'S REPLY BRIEF** on the interested parties in this action as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 4, 2021, at Stanford, California.

_____

Ana Villanueva

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